Supreme Court, U.S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-397

CHARLES LEE, JR.,
THOMAS KNIGHT,
DAVE MARTIN,
VERNON CARTER,
LOUIS HOLLINGSWORTH,

Petitioners,

v.

STATE OF INDIANA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below	1
Statement of the Case	2
Statement of the Facts	2
Reasons for Disallowance of the Writ	3
Conclusion	5

TABLE OF AUTHORTIES

Cases: *Page*

Fairchild v. Schanke, 232 Ind. 480, 113 N.E.2d 159 (1953) 5

Oyler v. Boles, 368 U.S. 448, (1962) 4

United States v. Berrios, 501 F.2d 1207, (2nd Cir. 1974) 4

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 3, 4

Constitutional Provisions:

Constitution of the United States, Fourteenth Amendment 3

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Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Court of Appeals of Indiana, thereby refusing to review the opinion entered by the Indiana Court of Appeals in Cause No. 1-579 A 133 on December 18, 1979.

OPINION BELOW

The Indiana Court of Appeals for the First District entered a decision in this cause on December 18, 1979. This opinion may be found in Petitioners' Appendix A and is unofficially reported at 397 N.E.2d 1047. Rehearing was denied by the Indiana Court of Appeals on January 22,

1980 and transfer was denied by the Indiana Supreme Court on July 22, 1980.

STATEMENT OF THE CASE

Petitioners were charged by way of a multiple count indictment filed on July 26, 1978. The indictment included counts charging the Petitioners with conspiracy to commit professional gambling. Petitioners filed a motion to dismiss on August 16, 1978. This motion was overruled.

Jury trial was commenced on November 13, 1978. On November 15, 1978, the jury found petitioners guilty of two counts of conspiracy to commit professional gambling. On December 15, 1978, the court entered judgment on the merits and sentenced Petitioners Lee, Knight, Carter and Hollingsworth to serve two year terms of imprisonment. Petitioner Martin was sentenced to serve a term of one year.

Petitioners filed their motion to correct errors on February 9, 1979, and February 13, 1979 respectively. Subsequently, these motions were overruled.

Petitioners appealed their convictions and on December 18, 1979, the Indiana Court of Appeals for the First District affirmed the convictions, remanding for correction of sentence. Petitioners filed petitions for rehearing which were denied on January 22, 1980. On July 22, 1980, the Indiana Supreme Court denied Petitioners' petitions to transfer.

STATEMENT OF THE FACTS

Petitioner Thomas Knight operated a tavern in Evansville, Indiana known as "Knight's Nite Spot". Gambling activities were conducted in a room in the rear of the tavern. Customers seeking entrance to the room were screened by a door attendant, whose duty it was to refuse entrance to undesirables and watch for police. Once in the

room, customers were provided with food, beer, and coffee without charge. Customers played blackjack and dice against the house, and some customers won or lost up to $500 in one evening. The evidence showed that each of the petitioners participated in the management and/or operation of Knight's Nite Spot. Sometime in 1977 the gambling operation of Knight's Nite Spot ceased. However, the operation was reestablished in a new location and continued until police surveillance was detected by the operators in January of 1978.

In support of their motion to dismiss, Petitioners introduced evidence that various religious, social and veterans organizations were permitted to conduct gambling activities in Evansville without prosecution.

REASONS FOR DISALLOWANCE OF THE WRIT

Petitioners assert that their convictions for conspiracy to commit professional gambling constitute a denial of equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. In support of their argument, Petitioners rely heavily on this Court's decision in *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). However, the Indiana Court of Appeals justifiably distinguished the facts of *Yick Wo* from those of the case at bar. In *Yick Wo* this Court was presented with the discriminatory enforcement of a San Francisco ordinance purporting to regulate the operation of public laundry businesses in wooden buildings. The ordinance vested discretion in a board of supervisors to grant consent to those wishing to operate a public laundry in a wooden building. Criminal penalties were provided for those operating a laundry without such consent. The facts showed that consent was generally given to non-Chinese applicants, while applications from Chinese subjects were refused without exception. This Court held that such discriminatory design

violated the Fourteenth Amendment to the United States Constitution.

Petitioners, unlike the Chinese subjects in *Yick Wo,* are not members of a readily identifiable class singled out for prosecution. Prosecutorial selection is constitutionally prohibited if deliberately based upon an unjustifiable standard such as race, religion, or some other arbitrary classification. *Oyler v. Boles,* 368 U.S. 448, (1962). Respondent feels that the Court of Appeals for the Second Circuit correctly summarized the law of discriminatory prosecution in *United States v. Berrios,* 501 F.2d 1207, 1211 (2nd Cir. 1974) as follows:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination.' See Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497 (1943); Moss v. Hornig, 314 F.2d 89, 92-93 (2d Cir. 1963); United States v. Ahmad, 347 F.Supp. 912 (M.D.Po.1972), aff'd sub nom., United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973); United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972); United States v. Ahmad, 347 F.Supp. 912 (M.D.Pa.1972), Comment, 'The Right to Nondiscriminatory Enforcement of State Penal Laws,' 61 Colum.L.Rev. 1103 (1961). Mere 'conscious exercise of some selectivity in enforcement is not in itself a federal

> constitutional violation.' Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962).

Petitioners have failed to show that the prosecutor in the case at bar exercised his discretion invidiously or in bad faith. Respondents assert that the facts of the instant case present the justified use of discretion on the part of the prosecutor in deciding which cases to prosecute.

Petitioners cite *Fairchild v. Schanke,* 232 Ind. 480, 113 N.E.2d 159 (1953) in support of their argument that the prosecutor's selective enforcement of the Indiana gambling statutes is based on an unjustifiable standard. However, Respondent would point out that *Fairchild* was decided under principles of Indiana Constitutional law and the Indiana Supreme Court did not reach the broader federal question considered here. As a question of federal constitutional law, the failure of the prosecutor to prosecute charitable organizations does not constitute denial of equal protection to Petitioners.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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